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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-732

DOUGLAS DALE SUTTER,

Petitioner,

-v-

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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It was unnecessary and prejudicial to inform the jury that Petitioner, when arrested, possessed three marijuana cigarettes, an uncharged crime. It was unnecessary because an alternative method of proof, free from prejudicial side effects, was available. The alternative was the Petitioner's

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 5, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 484 F.2d 118 (9 Cir. 1973), was entered on September 5, 1973. A true copy is included in the Appendix to this Petition as Exhibit "A".

JURISDICTION

On September 5, 1973, the United States Court of Appeals for the Ninth Circuit entered its judgment affirming the conviction of the Petitioner for possession of a controlled substance with intent to sell in violation of

21 U.S.C. § 841(a)(1). Jursidiction to review the decision of the Court of Appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1). No application for rehearing by the Court of Appeals was filed. Two extensions of time to file this Petition have been granted by this Court.

QUESTIONS PRESENTED

1. Was it error for the Trial Court to allow the prosecutor to present evidence of the accused's involvement in uncharged criminal activity where such evidence was unnecessary?

2. Was it error for the prosecutor to present evidence of the accused's involvement in uncharged criminal activity where such evidence was unnecessary?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be . . . deprived

> of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

STATEMENT OF THE CASE

On September 27, 1972, an indictment was filed in the United States District Court for the Southern District of California charging the Petitioner in one count with knowingly and intentionally possessing, with intent to distribute, approximately 100 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1).

The events leading up to Petitioner's arrest are undisputed. On September 21, 1972, at 6:35 P.M., Petitioner, driving a rented automobile, was stopped at the Border Patrol Check Point at San Clemente, California. He was asked to open the trunk of the car. At that time he

appeared a little nervous. His key would not open the trunk lock and two Border Patrol agents thereupon removed the rear seat of the vehicle. Approximately 100 pounds of marijuana was discovered in the trunk. The Petitioner was then placed under arrest and searched. Three marijuana cigarettes were discovered in his left shirt pocket.

On January 3, 1973, before the commencement of trial, the Assistant United States Attorney and Petitioner's attorney met with the Trial Judge in chambers to argue the admissibility of evidence relating to the marijuana cigarettes. The Judge ruled that the prosecutor could offer evidence on this subject. Petitioner's attorney thereupon stated that he would stipulate, at trial, that Petitioner had knowledge of the characteristics of marijuana if the Judge would

refuse to allow evidence concerning the cigarettes. The prosecutor rejected the stipulation and the Judge again ruled that he would allow evidence on the subject.

During the trial, Petitioner's attorney objected to testimony concerning the cigarettes and to their receipt in evidence. There was no trial testimony that would form the basis for inferring any of the following: That anything was in the trunk of the car; That the marijuana in the trunk could be smelled, seen, or otherwise detected, from inside or outside of the car, until after the Border Patrol Agents removed the back seat; or That there was any physical similarity between the marijuana in the cigarettes and the marijuana discovered in the trunk of the car.

The Petitioner did not testify in his

own behalf during the trial.

Before the jury was instructed, the Judge called counsel into chambers to discuss jury instructions. He advised both attorneys that he intended to instruct the jury that the cigarettes were circumstantial proof only of Petitioner's knowledge of the character of the contraband. The prosecutor made no objection to the proposed limiting instruction, nor did he request an instruction that the cigarettes, and Petitioner's possession thereof, could be considered by the jury for any other purpose.

REASONS FOR GRANTING THE WRIT

The writ should be granted since the record presents a clear opportunity for this Court to evaluate the following fundamental rights and duties: the right of the accused to be protected from

evidence of his involvement in uncharged criminal activity where such evidence is unnecessary; and the corollary duties of the prosecutor and the Court to reject such evidence where an alternative method of proof will avoid prejudice to the accused.

Petitioner submits that it was unnecessary and prejudicial to inform the jury of his possession of the three marijuana cigarettes, an uncharged crime. The cigarettes were relevant only to prove that the Petitioner was acquainted with the characteristics of marijuana. It was unnecessary to present them to the jury because an alternative method of proof, free from prejudicial side effects, was available. The alternative was the Petitioner's offer to admit by stipulation that he was familiar with marijuana.

Therefore, it was an abuse of discretion for the Trial Court to refuse

Petitioner's offered admission. It was misconduct for the prosecutor to reject the offered stipulation and thereafter present the prejudicial evidence to the jury.

Damon Runyon, commenting on prosecutorial conduct in a criminal trial, once wrote:

> The prosecutor represents the people. His function is to endeavor to convict any person who has transgressed the laws. It is inconceivable that he would wish to convict an innocent person. But it has been my observation that the attorney for the state is quick to take advantage of the rules that put his side in front and equally quick to forestall any moves by the other side. 1/

This observation is particularly applicable to the advantage-gaining rule allowing presentation of evidence of the

---

1/ The citation is unknown. The comment, which has been paraphrased, was obtained from Courts on Trial, by Jerome Frank, Princeton University Press 1949, at Pages 91 and 92.

accused's involvement in uncharged criminal activity to prove knowledge, intent, motive and many other things. The prosecutor in this case took advantage of that rule to bolster his chances of obtaining a conviction by unnecessarily informing the jury that the Petitioner, when arrested for the charged offense, was committing a similar but uncharged crime. The presentation of this evidence violated the fundamental precept that the accused is entitled to be tried only for the offense charged.

Petitioner asserts that the admissibility of evidence concerning uncharged criminal activity should be governed by a rule of "necessity". The court should not allow such evidence to be presented where a reasonable alternative method of proof is available. There should be a similar duty imposed on the prosecutor

to reject the use of such evidence where a reasonable alternative exists.

Frequently, and here, the element to be proved by the evidence of uncharged criminal activity is not a disputed issue in the case. In this situation, the prosecutor's claim of inherent right to present evidence on each element of the charge is nothing more than a clandestine ploy to gain a tactical advantage.

There is no question that it was a great advantage to the prosecutor to be able to present the cigarettes to the jury. However, he was not entitled to enjoy that advantage. Indeed, the advantage sought to be gained by the presentation of such evidence must be recognized as unfair where it is not necessary to prove a disputed issue. The Plaintiff and Defendant necessarily take the risk that the picture of the

case seen by the jury may be in an unfavorable decisional context. Neither side should be entitled to litigate a non-existant issue for the sole purpose of altering the decisional context in its favor. To do so should be reversible error.

Court dockets throughout these United States are increasingly swollen with drug trafficking cases. The aggregate national impact on our system of criminal justice would be substantial if the error in the instant case occurred in even a small percentage of prosecutions of this type. In fact, Petitioner submits the conduct complained of is the standard practice of prosecutors in most jurisdictions. Furthermore, the abuses complained of occur in almost all types of criminal prosecutions since one or more of the elements to be proved usually present an opportunity

for the prosecutor to evidence uncharged crimes to prove something.

The result is that the rule excluding evidence of uncharged crimes, fashioned to protect the accused from being convicted for a reason other than that he is guilty of the offense charged, has been subverted and eroded to the point where it has become a prosecutorial weapon, honored in its breach rather than its observance. It is time to reverse this trend.

Few courts in this country have addressed themselves to the issue of the accused's right to admit an element of the charge as an alternative to the prosecutor circumstantially proving it through evidence of uncharged crimes---- the Federal Courts and this Court never have. Thus, this Court can speak for the first time on an issue going to the

heart of the constitutional right to a fair trial by an impartial jury.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING PETITIONER'S OFFER TO ADMIT HIS "KNOWLEDGE" OF THE CHARACTERISTICS OF MARIJUANA.

A. The General Rule Is That It Is Within The Discretion Of The Trial Court To Allow The Accused To Admit An Element Of The Crime And To Exclude Evidence On The Admitted Element.

The few Federal cases on this subject hold that while the prosecutor is not required to accept an admission of the defendant, the admissibility of evidence to prove conceded facts is within the sound discretion of the trial court. United States -v- Mishkin, 317 F.2d 634, 638 (2 Cir. 1963); 88 C.J.S. Trial, § 57 and 58 (at pages 163 and 164).

The Federal courts that have examined this issue have followed the rule

set forth in Parr -v- United States, 255 F.2d 86 (5 Cir. 1958). In Parr, the appellant was convicted of transporting obscene motion picture film. The Government was permitted to exhibit some of the film over the appellant's objection and offer to stipulate that the film was, in fact, obscene. The Appellate Court, noting that the admission would relieve the Government of its burden of proving the obscene character of the film, stated it did not necessarily follow that the film should have been excluded from the view of the jury:

> It is a general rule that "a party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." 31 C.J.S. Evidence Sec. 299, p. 1068. The reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. (At Page 88).

Significantly, the Court in Parr, at page 88, noted that the general rule should be applied in that case since the motion picture film was the "gist" of the offense charged. In the instant matter, Petitioner was not charged with possessing the three cigarettes and they were unrelated to the factual events forming the basis of the offense charged.

B. It Was An Abuse Of Discretion To Allow The Presentation Of Evidence Of An Uncharged Drug Offense To Prove Admitted "Knowledge".

Where "knowledge" is not a genuine issue, a trilogy of California drug cases hold that it is an abuse of discretion for the Court to admit evidence of an uncharged drug offense to prove the accused had "knowledge" of the narcotic nature and character of the drug he allegedly possessed. Petitioner has been unable to find a comparable line of

Federal cases and therefore presents the California position submitting the logic is persuasive.

The three cases are: People -v- Lapin, 138 C.A.2d 251 (1956); People -v- Spencer, 140 C.A.2d 97 (1956); and People -v- Gonzales, 262 C.A.2d 286 (1968). In all three cases the convictions were reversed because uncharged drug offenses were evidenced to prove "knowledge" although that element was undisputed by the accused.

In Lapin knowledge was established by testimony concerning admissions against interest made by the defendant at the time of his arrest. These admissions were not denied at the time of trial. In Spencer the defendant's in-court testimony established his knowledge of the narcotic nature of the drug he allegedly possessed. Finally, in Gonzales the defendant, without testifying, offered to

admit by stipulation his knowledge of the narcotic nature and characteristics of marijuana.

The factual situation in Gonzales is similar to that in the instant matter. In reversing, the Court stated:

> We hold Gonzales, before testifying or without testifying, was entitled to do what Spencer did by testifying in People -v- Spencer, supra, 140 Cal. App.2d 97. The trial court, in other words, had the discretion to allow a defendant to admit his knowledge of the narcotic nature of the narcotic he allegedly possessed, and, thereby, prevent the introduction of prejudicial evidence of other offenses to prove admitted knowledge. (At pages 290-291).

California is not the only state to reach the above conclusion. Courts of both Oregon and Texas have rendered similar decisions. State -v- Bowen, 492 P.2d 480 (1972); State -v- Zimmerlee, 492 P.2d 795 (1972); Hafti -v- State, 416 S.W.2d 824 (1967); Chandler -v- State, 417 S.W.2d 28 (1967).

C. The Admissibility Of Evidence Of Uncharged Criminal Activity Should Be Governed By A Rule Of Necessity. The Court Should Reject Such Evidence Where A Reasonable Alternative Method Of Proof Is Available.

Petitioner submits that the admissibility of evidence of uncharged criminal activity by the accused should be governed by a rule of necessity. The Court should reject such evidence where a reasonable alternative method of proof is available.

The criteria to determine whether the alternative method of proof is reasonable should include these considerations: Does the alternative have equal or greater probative value as evidence; Is it free from prejudicial side effects; Will it make the prosecutor's coherent presentation of other evidence substantially more difficult; Will it foreclose the prosecutor from obtaining a conviction under differing theories; Will it soften the

impact of the evidence in its entirety, thereby depriving the Government's case of its legitimate persuasiveness and forcefulness; Will it necessitate an undue consumption of time; and Will it create a substantial danger of confusing the issues, or of misleading the jury?

D. In This Case The Court Should Have Excluded The Three Marijuana Cigarettes Because Petitioner's Offer To Admit His "Knowledge" Was A Reasonable Alternative Method Of Proof.

Petitioner contends that the state of the evidence at the time the prosecutor began to elicit testimony from the Border Patrol Agent concerning discovery of the cigarettes in Petitioner's shirt pocket was such that their sole relevant use was to prove his knowledge of the characteristics of marijuana.

The cigarettes were not relevant on the issue of possession because there was no testimonial nexus (foundation) from

which the Petitioner's possession of the cigarettes could have formed the basis of an inference that he was aware that anything, much less marijuana, was in the trunk of the car. Similarly, the requisite intent to distribute could not reasonably be inferred from Petitioner's possession of the cigarettes. Furthermore, the act of possessing one hundred pounds of marijuana, if committed, indisputably showed an intent to distribute by virtue of the commercial quantity involved.

The offered admission was in all respects a reasonable alternative method of proof which would have avoided the prejudice which necessarily resulted from presenting the cigarettes to the jury. The Petitioner's defense, already developed, was not that he did not know what marijuana was, but that he was not guilty of possessing the particular marijuana charged in

the information.

It was clear that knowledge of the narcotic nature and character of marijuana was not a disputed issue. Thus, there was no reason and no justification for the Court to refuse Petitioner's offered admission and to allow presentation of the cigarettes with the attendant danger of their misuse by the jury. This was an abuse of discretion depriving Petitioner of the right to a trial by an impartial jury under the Sixth Amendment to the United States Constitution and his right to fundamental fairness under the due process clause of the Fifth Amendment.

II. THE PROSECUTOR COMMITTED REVERSIBLE ERROR BY REFUSING PETITIONER'S OFFER TO ADMIT HIS "KNOWLEDGE" OF THE CHARACTERISTICS OF MARIJUANA.

This Court has stated that the pro-

secutor is more than a mere advocate of his client's cause. The prosecutor is charged with seeing that justice is done. While he may strike hard blows, he is not at liberty to strike foul ones. Berger -v- United States, 295 US 78, 88 (1935).

The arguments set forth by Petitioner in Argument I of this Petition establish that there was no necessity or justification for the prosecutor to refuse the offered admission by stipulation. By refusing the stipulation and presenting evidence concerning Petitioner's possession of the marijuana cigarettes, the prosecutor struck a "foul" blow and breached his duty to refrain from employing improper methods calculated to produce a wrongful conviction. This was error.

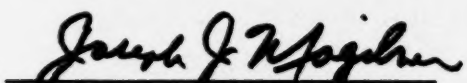
For the reasons expressed in Argument I of this Petition the prosecutor's

error was prejudicial and deprived Petitioner of the right to a fair trial by an impartial jury under the Sixth Amendment and the right to fundamental fairness under the due process clause of the Fifth Amendment.

CONCLUSION

For the above reasons, the Petitioner, DOUGLAS DALE SUTTER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,



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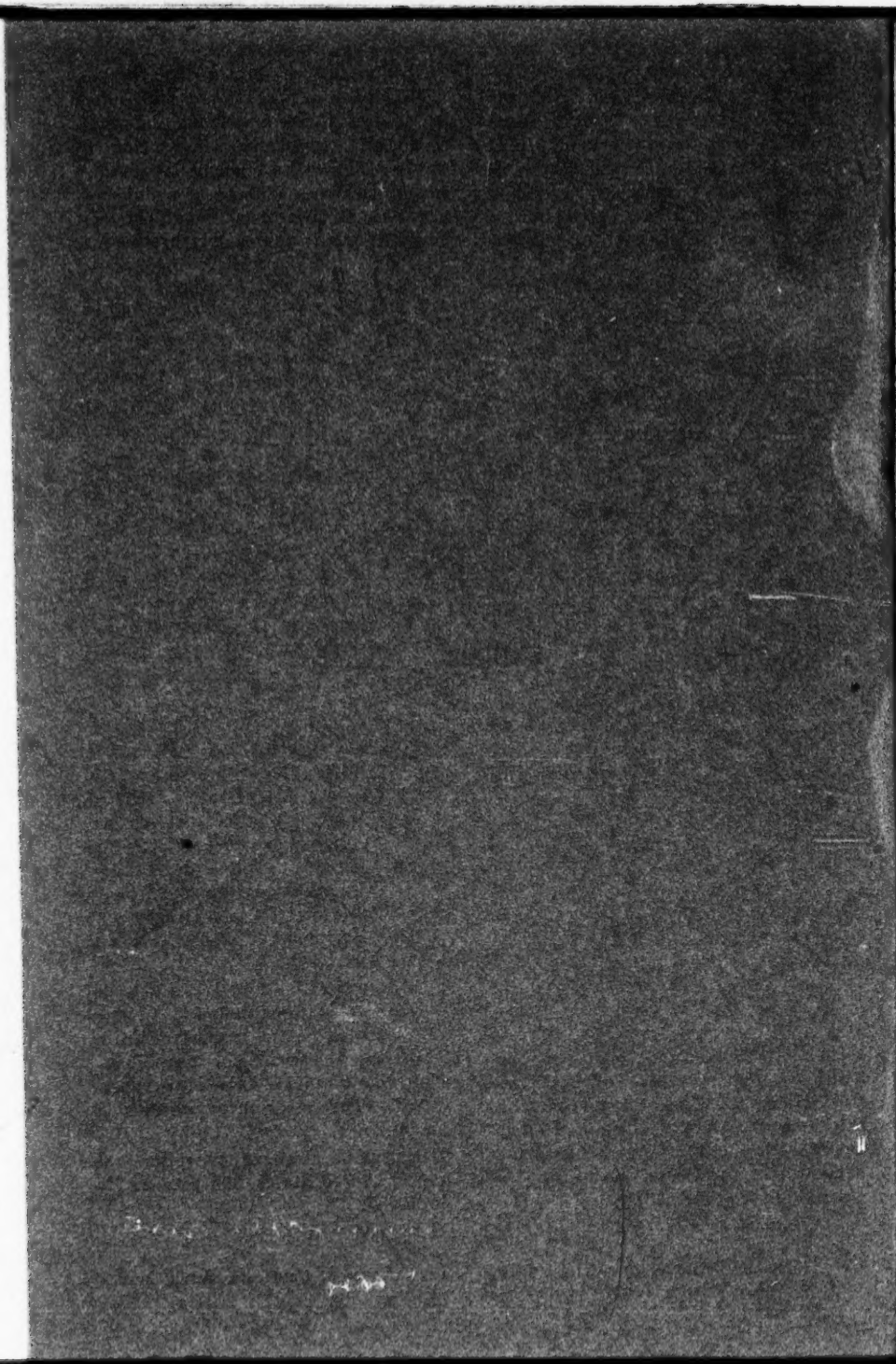
February 19, 1974

EXHIBIT



the charge that one of the two defendants conspired with the unknown persons, that defendant's conviction may stand in spite of the fact that the other defendant was acquitted. [citation]. If the conviction of one defendant may be sustained for conspiring with unknown persons, certainly it may be sustained where the evidence discloses a conspiracy between the defendant and the named co-conspirator, even if the latter is not indicted."

DiStefano's other assertions of error with respect to admission of evidence concerning transactions before the indictment and complaints about the court's instructions on conspiracy are without merit.

As to the defendant Reina, the judgment of the District Court will be reversed and the cause remanded with the direction that a new trial be granted.

The judgments against DiStefano will be affirmed.

Douglas Dale SUTTER, Appellant,

v.

UNITED STATES of America, Appellee.

No. 73-1668.

United States Court of Appeals, Ninth Circuit.

Sept. 5, 1973.

Defendant was convicted before the United States District Court for the Southern District of California, Leland C. Nielsen, J., of possessing controlled substance with intent to sell, and he appealed. The Court of Appeals held that admission of three marijuana cigarettes was not abuse of discretion.

Affirmed.

Criminal Law ⇐494(4)

Admission, in prosecution for possessing controlled substance with intent to sell, of three marijuana cigarettes found on accused's person at time he was arrested with a commercial quantity of the substance in his automobile was not abuse of discretion, though principal purpose for offering such cigarettes into evidence was to establish that accused was acquainted with characteristics of marijuana and accused offered to stipulate that he had knowledge of such characteristics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Joseph J. Mogilner, (argued), San Diego, Cal., for appellant.

William A. Bower, Asst. U. S. Atty. (argued), Harry D. Steward, U. S. Atty., Stephen G. Nelson, Asst. U. S. Atty., San Diego, Cal., for appellee.

Before GOODWIN and WALLACE, Circuit Judges, and BYRNE,* District Judge.

PER CURIAM:

Appellant, convicted of violating 21 U.S.C. § 841(a)(1) (possessing a controlled substance with intent to sell) appeals. He asserts that the district court abused its discretion when it permitted the government to place in evidence three marijuana cigarettes found on his person at the time he was arrested with a commercial quantity of the substance in his automobile.

To keep out the evidence, the appellant had offered to stipulate that he was acquainted with the characteristics of marijuana, the principal purpose for which the three cigarettes were being offered. The government rejected the stipulation.

We find no abuse of discretion. *See* Deck v. United States, 395 F.2d 89 (9th Cir. 1968).

Affirmed.

*The Honorable William M. Byrne, Senior United States District Judge for the Central District of California, sitting by designation.

EX "A"

No. 73-732

FEB 21 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

DOUGLAS DALE SUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-732

DOUGLAS DALE SUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, because he offered to stipulate that he knew the nature and characteristics of marijuana, it was error to admit in evidence three marijuana cigarettes found on his person following discovery of a large quantity of marijuana in the trunk of the automobile he was driving.

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' probation and required to pay a $500 fine. The court of appeals affirmed (Pet. App. A).

On September 21, 1972, petitioner rented an automobile in San Diego, drove to Mexico and later that day

returned to the United States. He was stopped at the border patrol checkpoint located on Interstate Highway 5 near San Clemente (G. Ex. 8; Tr. 5, 27, 43-45, 8). He was the sole occupant of the vehicle, which had a suitcase in the back seat (Def. Ex. A; Tr. 9, 19-20).

At the station, a border patrol agent referred the car for secondary inspection because there was a greater likelihood of aliens being present in rented cars (Tr. 4-5). Agent Alvin R. Francis, checking the secondary lanes for aliens, asked petitioner to open the trunk of the car (Tr. 7-9). He observed petitioner, who was somewhat nervous, step from his car and attempt to get the trunk key into the lock. The trunk key would not fit, and Agent Francis was likewise unsuccessful in opening the trunk (Tr. 9-10). Two agents then removed the back seat and a cardboard divider and observed a large quantity of a substance which smelled like marijuana (Tr. 11). The trunk was then opened by a locksmith and found to contain a white plastic bag and three Mexican flour sacks, with a combined weight of about 100 pounds, filled with what was stipulated at trial to be marijuana (G. Exs. 1, 2, 2A, 2B; Tr. 18-19, 45). Petitioner was arrested and advised of his rights (Tr. 13). A search of his person disclosed three marijuana cigarettes in his shirt pocket (Tr. 13-14).

During a pretrial conference, defense counsel offered to stipulate that petitioner had knowledge of the general nature and characteristics of marijuana, provided the court "would refuse to allow testimony concerning the three marijuana cigarettes and refuse to receive said marijuana cigarettes in evidence" (Pet. App. C 3). The prosecutor declined the stipulation, and the trial court indicated that testimony concerning the cigarettes would be allowed. The court subsequently

charged the jury that petitioner was not on trial for possession of the three marijuana cigarettes and that such evidence was admitted and could be considered solely as circumstantial evidence indicating petitioner's knowing and intentional possession of the marijuana in the trunk (Tr. 58).

Petitioner contends that the introduction into evidence of the three marijuana cigarettes was prejudicial as evidence of a crime not charged and should have been excluded. He states that it was error for the prosecutor to refuse to accept a stipulation as to petitioner's knowledge of the characteristics of marijuana and for the court to permit introduction of the cigarettes after the stipulation had been offered. This contention is without merit.

The three marijuana cigarettes, discovered on petitioner's person at the same time the marijuana was discovered in the trunk, were a probative circumstance surrounding the commission of the crime charged and were admissible, as the court instructed, to show knowledge and intent. See *Deck* v. *United States,* 395 F.2d 89, 91 (C.A. 9). See also *DeCarlo* v. *United States,* 422 F.2d 237, 239-240 (C.A. 9). The prosecutor understandably rejected petitioner's offer to stipulate as to his knowledge of the characteristics of marijuana if the three cigarettes were excluded. Such a stipulation, in exchange for exclusion of the cigarettes, would have aided petitioner in disavowing knowledge that the trunk of his rented car contained marijuana—a more dubious claim in view of his simultaneous possession of the cigarettes. In any event, a litigant is not required to accept an offered stipulation as to any relevant issue. See, *e.g., United States* v. *Brickey,* 426 F.2d 680, 686 (C.A. 8); *United States* v. *Mishkin,*

317 F.2d 634, 638 (C.A. 2); *Alire* v. *United States*, 313 F.2d 31, 34-35 (C.A. 10); *Parr* v. *United States*, 255 F.2d 86, 88 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

SUPREME COURT U. S.

Supreme Court, U. S.
FILED
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-732

DOUGLAS DALE SUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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REPLY TO
RESPONDENT'S MEMORANDUM IN OPPOSITION

I. RESPONDENT HAS MISINTERPRETED THE COURT'S LIMITING INSTRUCTION TO THE JURY.

In charging the jury, the Court stated the burden was on the Government to prove three elements:

> First, the defendant possessed the marijuana with the intent to distribute;
>
> Second, that the defendant did such act knowingly or intentionally; and,
>
> Third, that the substance alleged is in fact marijuana.
>
> As to this last element, the nature of the substance, let me remind you that during the trial the parties entered into a stipulation that a qualified chemist would testify that the substance was marijuana. Thus, of the three elements of the crime charged in the Indictment, two remain for your determination as the sole judges of the facts in the case:
>
> First, did the defendant possess the marijuana with the intent to distribute, and second, did the defendant do such act knowingly or intentionally.

> In this connection, ladies and gentlemen, I instruct you that you may not find the defendant guilty of the offense charged based upon his possession of the three marijuana cigarettes found in his shirt pocket. That evidence was admitted for one purpose and one purpose only, and that was as circumstantial evidence of his knowing and intentional possession of the other marijuana in the trunk. (Tr. 57-58).

The Court's limiting instruction related only to the second element to be proved. The Court clearly expressed its position during the hearing in chambers to discuss jury instructions. The following exchange occurred during the hearing:

> THE COURT?
>
> . . . . . .
>
> And I'll give them another instruction that the possession in the shirt pocket of the three marijuana cigarettes is not sufficient to sustain a conviction, that they must consider that only with the other evidence in order to convict. In order to convict, they must find he knew that the other marijuana was in the trunk.
>
> MR. MOGILNER: Does that mean that you're going to instruct them that the cigarettes in the shirt pocket are to show knowledge?

> THE COURT: That it's only circumstantial proof of knowledge of the character of the contraband. (Tr. 50).

The prosecutor made no objection to the proposed limiting instruction, nor did he request an instruction that the cigarettes, and Petitioner's possession thereof, could be considered by the jury for any other purpose.

It was clearly the intent of the prosecutor and the Court to admit the cigarettes only to establish that if the Petitioner had known that 100 pounds of substance was in the trunk of the car, he would have known the substance was the narcotic marijuana. This was what Petitioner had offered to admit.

The cigarettes were not admissible on the issue of possession. All that the cigarettes could prove was that the Petitioner was more likely than not in possession of the marijuana in the trunk. This does not fall within the area of the exceptions to the general rule permitting evidence of uncharged crimes.

People -v- Lapin, 138 C.A. 2d 251, 262 (1956). At best, the cigarettes merely created a probability or suspicion that Petitioner possessed the marijuana in the trunk of the car, and this was not sufficient to uphold a conviction. Moore -v- United States, 271 F.2d 564, 568 (4 Cir. 1959). The intent referred to in Deck -v- United States, 395 F.2d 89, (9 Cir. 1968) referred to intent to defraud the United States by illegal importation, as opposed to intent to possess. Deck is inapplicable here.

The Respondent's contention that the offered stipulation would have "aided Petitioner in disavowing knowledge that the trunk of his rented car contained marijuana" exemplifies the evil complained of. Our prosecutorial system placed the burden on the Government to prove that Petitioner possessed the marijuana in the trunk. There was no burden on the accused to disavow anything, and he did

not do so since he did not testify. The Respondent sought to create a presumption of guilt through the evidentiary ploy in question. He was not entitled to enjoy the advantage gained thereby.

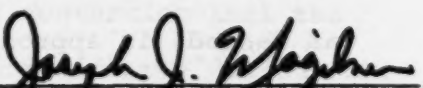
II. THE PETITIONER DID NOT DRIVE TO MEXICO.

Respondent has misread the facts on an important point. It was factually impossible for the Petitioner to have driven to Mexico on the day in question and the prosecutor, at trial, made no such contention.

Lindbergh Field in San Diego, where the car was rented, is approximately 15 to 20 miles North of the closest border with Mexico (Tr. 27) When the car was rented at Lindberg Field, the odometer reading was 12,055 miles (Tr. 31). When the car arrived at the San Clemente Check Point the odometer reading was 12,130 miles (Tr. 44) indicating that it had been driven 75 miles since rented. It was stipulated that it is approximately 60 to 61 miles from

Lindbergh Field to the San Clemente Check Point (Tr. 45). The Petitioner would have had to have driven at least 91 miles if he had gone from Lindbergh Field to the Mexican Border and then to the San Clemente Check Point. Since the odometer reading on the car indicated it had only traveled 75 miles, the Petitioner could not have gone to Mexico. There was no testimony indicating that Petitioner had been to Mexico and the prosecutor did not suggest he had been there.

Respectfully submitted,



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February 25, 1974.